

**HUD HOUSING CERTIFICATE FUND  
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NEGOTIATED REGULATIONMAKING ADVISORY COMMITTEE  
SEPTEMBER 28-29 1999 MEETING SUMMARY**

**Tuesday, September 28**

**I. Introduction**

The last scheduled meeting of the Reg Neg Committee (after postponement due to severe weather earlier in the month) opened with a brief introduction by Larry Susskind of the facilitation team. David Fairman followed with a brief summary of the correspondence and comments of the last weeks of September.

David outlined the following still unresolved elements of the Committee's recommendations and HUD's proposed Draft Regulation and Draft Notice:

Section (g) (2) of the Draft Regulation continued to include language which gave HUD broad authority to make changes to the funding allocation system if necessary to contain the growth of program costs, after undertaking informal consultation with program stakeholders. This language reflected concern among HUD senior staff who felt that HUD needs to make explicit its authority to respond to excessive growth in costs both for individual PHAs who are exceeding their budget authority and for the entire S.8 program.

This language continued to concern many Committee members because they felt it gave HUD excessively broad discretion. The specific scenario that Committee members seemed to be most concerned about was one in which HUD used its discretionary authority under this section to limit the growth of program costs, instead of presenting to OMB and Congress a budget request that represented the full cost of running the program to meet the multiple (and potentially costly) goals that Congress and HUD have set for it.

Other issues which required final resolution, and which the facilitation team believed could be resolved in the meeting, included:

- Use of reserves, and how HUD will authorize recycling of reserves among PHAs
- AAF, and PHAs opportunity to ask HUD to review their assigned AAF if the PHA anticipates that it won't be sufficient to cover costs for baseline amounts.
- Reallocation of ABA among PHAs and the structure it would take

- Lease-up threshold which triggers HUD to review a PHA's budget and possibly change its ABA as a result (the 90/90 budget utilization and lease-up rate issue)
- Calculation of initial baseline, and a question of how exactly it would be determined given some slightly confusing wording in the Regulation and Notice.

Robert Dalzell then explained that this meeting would be the final opportunity for feedback and final edits to the draft Regulation, because the Committee's Charter expires on September 30, and because it would be necessary to finalize the Regulation in the next week in order to publish it by October 21 as mandated by Congress. The Committee concurred with the "Time is of the Essence" sentiment, and all expressed desire to come to closure on the above, and any other outstanding, issues.

## **II. Reports and Final Recommendations**

Larry Susskind explained that CBI will create a report which contains the extent of the Committee's recommendation and endorsement of the Draft Regulation and Draft Notice. The report will include a summary of Committee meetings, with explanations of why certain agreements were reached, and a list of issues addressed that were beyond the scope of the Reg Neg, but which the Committee recommended for HUD consideration. The Committee Report, as it is called, will be public information, and Gloria Cousar suggested it could be posted on the HUD web site and otherwise made available to the public.

Robert Dalzell then briefly reviewed the newest Draft Regulation dated 9/27/99, highlighting the newly drafted preamble, and a few changes in response to comments from previous Committee meetings and teleconferences.

## **III. September 27, 1999 Draft Regulation – Section (g)**

Committee members asked if HUD would ever cut ABA to the point where the baseline number of families for a PHA could not be supported at that PHA's ACPU. HUD representatives responded that HUD reserved the right to cut a PHA's ABA to below the baseline if extreme circumstances required it. They stressed that this would be an extreme case situation, and would never be done on such a widespread basis that it would jeopardize the baseline at the national level.

HUD representatives went on to say that (g) (2) is meant to address costs that have risen dramatically and unexpectedly, even though the PHA might be underleased and simply have a bloated ACPU. It was also important to HUD to consider a more widespread cost increase scenario over many or all PHAs, wherein HUD wanted the ability to keep PHAs choice of payment standards as revenue neutral, meaning that if a PHA chooses a higher payment standard, their total costs cannot go up.

The entire Committee agreed upon three broad scenarios under which HUD's authority to reduce ABA could be invoked:

- 1 – a single PHA had legitimate reasons for dramatic cost increases
- 2 – a single PHA had dramatic cost increases for unjustifiable reasons or poor management
- 3 – a group of PHAs demonstrate, in a systematic way, dramatic cost increases. HUD could then determine that those costs are likely to increase beyond HUD's ability to support the program, and so must be reined in.

One member commented that HUD was not enabled by the statute to cut payments to PHAs such that the baseline number of families was not served. Others concurred that HUD had no authority to "arbitrarily" cut payments to PHAs, particularly if it meant that fewer than the baseline number of families could be served. Many could imagine legitimate and reasonable circumstances under which a PHA's costs would rise dramatically, and even if all PHAs chose a 110% payment standard, then HUD should be responsible for supporting those costs. Most Committee members believed HUD was not statutorily authorized to simply cut programs to bring overall costs down.

A HUD representative commented that HUD was charged with managing the national program, and ensuring that, overall, the baseline number of families were helped. Meeting that mandate could require reallocating units (or dollars) from a PHA with high per unit costs to ones with lower per unit costs, such that costs are lower overall and the minimum number of families, nationally, are served.

Committee members pointed out that even if HUD made a "systemic" change in funding levels, it would require an analysis of each PHA on a case-by-case basis to determine whether or not the costs were reasonable and justifiable in terms of program goals. HUD representatives concurred that a systemic change would involve an individual analysis, which is why HUD supports the inclusion of the phrase "systemically" in the section. They added that if HUD created criteria under which PHAs might have their ABA reduced, it wouldn't really be case-by-case, it would be systematic or categorical, and should be named as such.

Committee members asked to strike the word "systematically" from the preamble and clarify it in the Regulation. Most Committee members felt that HUD was not authorized to reduce the total support to the Section 8 program. Although HUD must have the ability to compensate for an anticipated program-wide shortage due to some systemic growth in costs, it has this authority within each ACC and other emergency measures which HUD/Congress could take (and always have been able to take). More importantly, by including this clause, HUD is attempting to "predict" what type of cost increases might occur, when the Committee proposed that it was not possible to know

what effect the ability to choose payment standards would have on total costs, or to predict what any trends might be under the new program guidelines and goals.

A Committee member suggested that the concept of “temporary” be added to the clause, to say that HUD could contain costs immediately and temporarily, and then follow up with PHAs and industry experts to determine why/what could be done long-term to contain costs and preserve the program. Committee members continued to be concerned that subsequent HUD administrations may act on this clause arbitrarily and capriciously, without basis in actual cost trends gathered in the coming months/years, or without consultation and analysis on a case-by-case basis with PHAs and industry representatives.

The facilitation team outlined several different approaches to solving the impasse:

a – describe the circumstances under which it would be invoked (e.g. only if PHAs were not achieving program goals, over budget, underleased, etc.)

b – triggers – when and how will it be used (e.g. if costs are up by X%, or X% more than last year)

c – minimize consequences to the PHAs when it is invoked (e.g., give PHAs a chance to voluntarily attrit or reduce payment standards such that costs came down, or to appeal case-by-case in response to HUD reductions of their ABA).

The team suggested that a caucus of non-HUD Committee members meet briefly to discuss their options given that HUD was committed to including the clause. HUD representatives and staff also caucused during this time. The entire Committee then reconvened to make final proposals to meet the interests of all stakeholders.

After further discussion, the group agreed on the revised draft wording to Section (g)(2) and (g)(4) that is presented in the attached September 30, 1999 draft Regulation, and on accompanying explanatory language in the Preamble to the Regulation (Section III, second Issue.)

It was also suggested that a sentence in the Preamble regarding section g(3) be changed from the words “PHAs that hold costs down” to “PHAs whose per unit costs are declining”. This addressed a concern that a PHA could engage in maximized leasing as long as they had the money, regardless of whether costs go down because of management efficiencies, change in market, or any other reasons. HUD agreed to this change.

The final agreements, in both the Preamble and the Regulation itself, can be reviewed in the final draft, attached.

#### **IV. Draft Regulation – Other Sections**

Section (i): HUD proposed adding section (i) to clarify HUD's authority to reallocate budget authority. A Committee member pointed out that it was discussed in the Notice, but there was no reference to it in the Regulation. The Committee agreed to add section (i), and made complementary changes to the preamble explaining it. Section (i) allows ABA in excess of 2 months' reserve to be recaptured by HUD, at the end of the PHA's fiscal year. It was clarified that the formula would still apply to most accurately project the PHAs costs for the following year, regardless of whether any ABA was recaptured or not.

Although a PHA may permanently lose units through the reallocation process, a new sentence was added in the preamble to indicate that PHAs are always eligible to apply for new units and become eligible for receiving new units. A Committee member felt this tempered the concept of "permanent loss" of a PHAs units.

Section (h): There was clarification from HUD that even if contracts were "pro-rated" and expired at a different date, the total BA for that year would be sufficient to pay for all the contracted units for that year, as well. The term "pro-rate" does not authorize HUD to reduce the amount of unit-months in any way, but allows them to shift the BA from one calendar period to another. HUD agreed that small amounts of BA may be affected if per-unit costs fluctuate substantially from one year to the next, and the total BA could be different since the PHA is only guaranteed to get enough to cover their per-unit costs. The Committee overwhelmingly agreed that this risk was worth taking for the benefit of having their renewals synchronized to a once-annual date. One Committee alternate agreed to continue discussion of this concern with HUD in other forums.

Section (d): A Committee member asked why the Reg. language had an "either/or" choice for the baseline amount, which seemed confusing. HUD representatives proposed a clarification to both the Regulation and the preamble, which would make it more clear exactly how the formula worked and how the exact number of baseline units would be calculated [also in section (b)]. The Committee agreed to the clarifications, putting the focus on getting the baseline correct and keeping the clause for correcting errors in place.

Preamble: Clarification was made to a section of the preamble which addressed the leeway which PHAs are to have in choosing to set their payment standards and affect their per unit costs, as long as they adhere to rent reasonableness standards and other programmatic requirements.

## **V. Timeline For Publication of the Regulation and Notice And Next Steps**

Robert Dalzell reviewed the process the Notice and Regulation would go through to be enacted. The Regulation will become effective on January 1, 2000. Because it is a final Regulation, it does not need to be submitted to Congress as a "proposed Regulation",

and will simply be enacted. HUD would like the Notice to be published simultaneously, but it is possible the Notice may be delayed by a few days or weeks. The Notice is on schedule to be published in the Federal Register and in place by January 1, 2000.

In both cases, HUD believes that all the final approvals (from senior HUD officials, and OMB) are imminent, but it is possible that some last-minute revisions may be requested of them. HUD will notify the Committee if any substantial deviation from the Draft Regulation and Notice are requested and implemented. The final version of the Reg. and the Notice will be distributed to the Committee as soon as HUD has published it.

## **Wednesday September 29**

### **VI. Draft Notice**

Robert Dalzell reviewed a large number of edits to the Draft Notice made in response to questions and comments from the Committee. Most of the changes were clarifications or in many cases, additional examples to illustrate what sections were intended to do and how PHAs should interpret the Regulation and Notice.

#### Section VI. E.

Committee members wondered why their recommendation of using a 90% lease and budget threshold was not addressed, and instead a 98% threshold was used. Gloria explained that by keeping the bar low (at 90%), a PHA who managed to recover to the 90% would still be in a serious danger zone in HUD's eyes. HUD believed that keeping it at 98% ensured that the PHAs would improve to the level of excellent performance, instead of just improving to 90% which itself is barely acceptable, particularly if it happened repeatedly. A suggestion to set 90% as a target for the first time it happens, then hold the PHA to a higher lease/budget rate for any repeat transgressions was put forth. Others felt that a 95% rate should be used, because it was the SEMAP standard and maintained consistency throughout the program.

There were also questions as to whether it was fair to require a PHA to achieve both a certain lease-up AND a budget utilization rate, or if the test should be one OR the other. The underlying concern was that a PHA might be able to achieve high lease-up rates without using its full budget authority, and that to require a PHA to use more than 90% of its ABA to achieve 95% lease-up might create a perverse incentive for wasteful use of funds.

After further discussion, all agreed to a requirement that PHAs achieve a 95% lease-up rate, with no specific percentage requirement for budget utilization.

#### Section VI. F.

A Committee member wondered if the Notice would be a PIH notice or a Federal Register Notice. HUD and other Committee members felt that a Federal Register notice would unnecessarily slow down the process of recycling and reallocating. Many felt that a PIH notice was sufficient, and provided appropriate advance notice to any PHAs. It was resolved that HUD would issue and enact a PIH notice, then subsequently publish that in the Federal Register as an “FYI” step for anyone who had not been made aware of the allocation through the PIH notice process.

#### Section V. B.

A Committee member commented that the concept of “Reward”, which many had believed should be associated with increased access to reserves, had gotten overlooked. Gloria responded that she felt increased reserve access was a likely “reward” for high performers, it was too complicated to address in detail during this Reg Neg. She suggested, and all agreed, that the Notice be edited to indicate that transferred BA may be used as a performance-based incentive, which gives HUD the opportunity to explore and refine that idea in the future.

## **VI. Conclusion**

By the conclusion of the meeting, all the outstanding issues had been resolved and final language proposed and approved by the entire Committee and HUD. Although several Committee members commented that they wanted to see the final product (Regulation and Notice) before full sign-off, all were in agreement on the two documents as of the close of the meeting.

HUD Deputy Assistant Secretary Gloria Cousar specifically thanked all who had participated throughout the 6-month process, including HUD staff and each of the Committee members, and said she was encouraged by the strong working relationship which had been forged between the Committee members and her staff. She and other HUD staff were anticipating continued interaction with PHA representatives on these and other Section 8 issues in the future.

The Committee congratulated itself on a job well done, and at the absence of any public comment, the facilitation team formally adjourned the Committee.